TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 98.

SAMUEL MONROE AND DAVID M. RICHARDSON, LATE COPARTNERS TRADING AS MONROE AND RICHARDSON, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 29, 1900.

(17,819.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 11, 1901.

1 Court of Claims.

SAMUEL MONROE and DAVID M. RICHARDSON, Late Co-partners Trading as Monroe and Richardson,
vs.
THE UNITED STATES. } No. 20003.

I.—*Original Petition. Filed April* 29, 1896.

To the Chief Justice and Judges of the Court of Claims:

The petition of Samuel Monroe and David M. Richardson, late copartners, trading as Monroe and Richardson, respectfully shows:

I.

That your petitioners are citizens of the United States, and of the State of Ohio.

II.

That on or about the 25th day of May, 1892, the United States, through W. L. Marshall, a captain in its corps of engineers,
2 put out an advertisement inviting proposals for constructing a canal, to be known as the Illinois and Mississippi canal, upon certain terms, conditions, and specifications, all of which are fully and at large set forth in Exhibit B, hereto attached and made part of this petition.

III.

That in response to the said advertisement, and in strict accordance with all its requirements, your petitioners submitted a bid or proposal to do certain parts of the said work, which proposal was duly accepted by the United States, and your petitioners were so notified in writing by the said Captain W. L. Marshall, corps of engineers, on the 19th day of July, 1892.

IV.

That on the 20th day of July, 1892, the said Captain W. L. Marshall forwarded a formal contract and bonds to be executed within ten days thereafter, which your petitioners fully executed and returned to the said engineer on the 28th day of July, 1892, which formal contract was duly signed by said Captain Marshall, the said contract and its form having been previously authorized by the Chief of Engineers of the United States.

V.

That immediately upon the award of the work to your petitioners and the acceptance of their bid your petitioners began active preparations for the commencement of the said work; that the work was of considerable magnitude and required the outlay of large sums of money in the preparation for its execution, and in pursuance thereof

your petitioners shipped from their home at Portsmouth,
3 Ohio, a car-load of tools to Rock Island, Illinois, rented and furnished a boat and had the same taken to Rock river, in the vicinity of the work, to be used as a boarding-house for men employed on the work, built stables for their teams, hired men and teams, purchased a large amount of plant consisting of shovels, plows, scrapers, and the like, and generally equipped themselves in a proper manner to expeditiously perform the work, and actually commenced the work with men and teams and prosecuted the same for three days.

VI.

That on the 6th day of August, 1892, without fault on their part and while the work was progressing to the satisfaction of the United States they were stopped by the United States and their contract abrogated, against their consent, by the United States, and the work that they had contracted to do readvertised, for the alleged reason that by the act of August 1, 1892, no work could be prosecuted by the United States without a stipulation in the contract, binding the contractor not to permit his workmen to labor more than eight hours per day; and notwithstanding that their said contract was awarded on the 19th day of July, 1892, prior to the passage of the said law, the United States refused to permit your petitioners to continue the work either under the terms of the contract or under the terms of the said law of August 1, 1892, but immediately, and against the protest of your petitioners, readvertised the work and let the said work to other parties.

VII.

That by reason of the unlawful action of the United States in
4 the premises your petitioners were put to great cost, expense, loss of time and were deprived of the profits that they would have made in the execution of the work.

VIII.

That your petitioners had had great experience in the performance of work of like character and, with the equipment plant and facilities that they had and had provided, that they would have been able, if not prevented by the United States, to have performed the work at a cost of them of the following sums:

On the first mile:	
78,943 excavation, at $7\frac{3}{4}$	$6,118 08
On the second mile:	
49,692 excavation at $10\frac{1}{4}$	5,093 43
On the third mile:	
27,665 excavation, at $8\frac{3}{4}$	2,420 68

Lock 36:	
1,000 cubic yards sand, 20 cts	200 00
2,500 cubic yards pebbles, 25 cts	625 00
9,074 cubic yards earth, 12 cts	1,088 88
Guard-lock:	
1,500 cubic yards sand, 25 cts	375 00
3,500 cubic yards pebbles, 25 cts	875 00
Timber:	
564 piles, at $2.50	1,128 00
55,000 feet, at $18.00	990 00
15,000 feet pine, at $18.00	270 00
9,600 feet oak, at $18.00	172 80
5,000 lbs. iron bolts, at 1¾ cts	87 50
420 lbs. carriage bolts, at 3½ cts	14 70
1,500 lbs. spikes, at 2½ cts	37 50
1,050 cubic yards concrete, at $2.50	2,625 00
Making an aggregate total cost of	$22,121 57

5 and that, at the contract price, your petitioners would have been entitled to have received for said work the sum of $47,607.46, leaving a net profit to your petitioners of the sum of $25,485.89, of which they were deprived by reason of the unlawful abrogation of their said contract.

IX.

Wherefore your petitioners pray judgment against the United States for the sum of twenty-five thousand four hundred and eighty-five dollars and eighty-nine cents ($25,485 89) and costs.

DAVID M. RICHARDSON.
SAMUEL MONROE.

JNO. C. FAY,
Attorney for Claimants.

STATE OF OHIO, }
County of Scioto, } *ss:*

On this sixteenth day of April, 1896, personally appeared David M. Richardson, one of the above-named claimants, who being duly sworn, on oath says that he has heard read the foregoing petition and knows the contents thereof; that the matters therein stated of his own knowledge are true, and those stated upon information and belief he believes to be true; that no assignment of the claim has been made.

DAVID M. RICHARDSON.

Subscribed and sworn to before me the day and year aforesaid.

[SEAL.]

CHAS. E. MOLSTER,
Notary Public within & for the County of Scioto & State of Ohio.

6 Articles of agreement entered into this 19th day of July, eighteen hundred and ninety-two (1892), between Captain W. L. Marshall, corps of engineers, U. S. Army, of the first part, and Samuel Monroe and David M. Richardson, partners, doing business under the firm name of Monroe and Richardson, of Portsmouth, of the county of Scioto, State of Ohio, of the second part.

This agreement witnesseth that, in conformity with the advertisement and specifications hereunto attached, and which form a part of this contract, the said Captain W. L. Marshall, corps of engineers, for and in behalf of the United States of America, and the said Monroe and Richardson for themselves, their heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, as follows:

That the said Monroe and Richardson, parties of the second part, in consideration of payments to be made as hereinafter provided, shall furnish all labor, material, and appliances, and shall perform the following work described in the specifications hereunto attached:

Shall construct three miles or less of the trunk of the Illinois and Mississippi canal, involving the following amounts, more or less, of earthwork, in excavation and embankment.

	Excavation. Cubic yards.	Embankment. Cubic yards.
1st mile	78,943	72,340
2d mile	49,691	46,786
3d mile	27,665	31,960

Shall screen, wash if necessary, sort and deliver at the respective lock sites, the following quantities, more or less, of sand and pebbles:

7

	Sand. Cubic yards.	Pebbles. Cubic yards.
At lock 36	1,000	2,500
At guard-lock	1,500	3,500

Shall excavate at the site of lock 36, Illinois and Mississippi canal, nine thousand and seventy-four (9,074), more or less, cubic yards of earth.

Shall prepare the lock foundations at lock 36, Illinois and Mississippi canal, and furnish and place in the work, the following quantities, more or less, of materials:

Five hundred and sixty-four (564) piles, driven, placed, sawed off, and barked.

Fifty-five thousand (55,000) feet, board measure, of pine timber.

Fifteen thousand (15,000) feet, board measure, of pine plank.

Nine thousand six hundred (9,600) feet, board measure, of oak plank.

Five thousand (5,000) pounds, avoirdupois, iron drift bolts.

Four hundred and twenty (420) pounds, avoirdupois, carriage bolts, with nuts and washers.

Fifteen hundred (1,500) pounds, avoirdupois, spikes or nails.

One thousand and fifty (1,050) cubic yards of concrete, the cement to be furnished and delivered by the United States at Milan, Ill.

And the United States in consideration of the work having been duly done, and the sand and pebbles delivered and accepted in accordance with the specifications above referred to, shall make payments as hereinafter provided, to the said Monroe and Richardson, as follows:

8 For earthwork, excavation, and embankment.

1st mile, seven and three-fourths (7¾) cents per c. y.
2d mile, ten and one-fourth (10¼) cents per c. y.
3d mile, eight and three-fourths (8¾) cents per cubic yard.
For sand, at lock 36, fifty (50) cents per cubic yard.
For pebbles, at lock 36, seventy-five (75) cents per cubic yard.
For sand, at guard-lock, forty (40) cents per cubic yard.
For pebbles, at guard-lock, seventy (70) cents per cubic yard.
For earth excavation, at lock 36, twenty-nine (29) cents per cubic yard.
For piles, in work, five dollars and fifty cents ($5.50) each pile.
For pine plank, in work, twenty-eight (28) dollars per 1,000 ft. B. M.
For pine timber, in work, twenty-nine (29) dollars per 1,000 ft. B. M.
For oak plank, in work, forty (40) dollars per 1,000 ft. B. M.
For iron drift bolts, in work, four (4) cents per pound avoirdupois.
For carriage bolts, in work, seven (7) cents per pound avoirdupois.
For spikes and nails, in work, five (5) cents per pound avoirdupois.
For concrete, in work, four dollars ($4.00) per cubic yard.

It is further agreed and understood between the parties hereto, that the party of the second part will screen, sort, and deliver to the party of the first part, sand and pebbles at the location of the gravel pits or deposits, in the quantities and at the prices proposed by them, viz:

9 Sand, at 15 cents per cubic yard,
Pebbles, for 25 cents per cubic yard,

sorted, screened, and delivered at the option of the party *party* of the first part, instead of at the lock sites as hereinbefore agreed upon, and that the party of the first part shall pay to the party of the second part the prices just named for such materials at the pits.

It is further understood and agreed that if the gravel or sand pits encountered in the excavation of canal trunk are of insufficient extent to supply the quantities stated herein, that the party of the second part shall not be required to screen, sort, and deliver the same at gravel pits or lock sites, beyond the amounts excavated from the canal trunk.

All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as — not conform to the specifications set forth in this contract shall be re-

jected. The decision of the engineer officer in charge as to quality and quantity shall be final.

The said Monroe & Richardson shall commence work on or before the first day of August, eighteen hundred and ninety-two (1892), and shall complete the lock-pit excavation and foundation on or before the thirtieth day of September, eighteen hundred and ninety-two (1892), and the canal-trunk earthwork on or before November 15, 1892.

If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the
10 sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part; and, upon the giving of such notice, all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States: Provided, however, that if the party (or parties) of the second part shall by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work, or delivering the materials at the time agreed upon in this contract, such additional time may, in writing, be allowed him or them for such commencement or completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting
11 forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, that no payments shall be made unless such supplemental or modified

agreement was signed and approved before the obligation arising from such modification was incurred.

No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished, under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

It is further understood and agreed that in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, that all sums due and percentage retained, shall thereby be forfeited to the United States, and that the said United States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited, and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same.

12 Payments shall be made on monthly estimates to the said Monroe & Richardson, when the partial work contracted for shall have been delivered and accepted, reserving ten (10) per cent. from each payment until the whole work shall have been so delivered and accepted.

Neither this contract nor any interest therein shall be transferred by the said Monroe & Richardson to any other party; and any such transfer shall cause the annulment of the contract so far as the United States are concerned. All rights of action, however, to recover for any breach of this contract by the said Monroe & Richardson are reserved to the United States.

No member of or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom.

This contract shall be subject to approval of the Chief of Engineers, U. S. A.

In witness whereof the undersigned have hereunto placed their hands and seals the date first hereinbefore written.

W. L. MARSHALL, [SEAL.]
Captain, Corps of Engineers.
SAMUEL MONROE. [SEAL.]
DAVID M. RICHARDSON. [SEAL.]

Witnesses:
S. F. PEGUES.
CHAS. E. MOLSTER.
W. H. WHITE.

13 II.—*Motion to Dismiss. Filed January 25, 1900.*

Come now the defendants, The United States by their Attorney General and move the court that the petition in the above-entitled cause be quashed and the case dismissed for the reasons—

1st. That the said petition fails to state facts sufficient to constitute a cause of action.

2nd. That this action is founded on a contract, a copy of which is annexed to the said petition and made a part thereof, which contains a specific provision of the tenor and effect, as follows: "This contract shall be subject to the approval of the Chief of Engineers, U. S. A." Not only does the contract itself a copy of which is attached as above, fail to show that the same was ever approved by the Chief of Engineers U. S. A., but the testimony in the case fully and conclusively shows, and the same is not denied by the claimant, that said contract has never been approved by the said Chief of Engineers, U. S. A., in any manner whatsoever.

Wherefore, the defendants pray that the petition may be quashed and action be dismissed accordingly.

Respectfully submitted.

L. A. PRADT,
Ass't Att'y Gen'l.

Order.

Allowed in part and judgment for defendants on findings of fact filed.

BY THE COURT.

February 26, 1900.

14 III.—*Findings of Fact and Conclusion of Law. Filed February 26, 1900.*

This case having been heard by the Court of Claims, the court upon the evidence, make the following

Findings of Facts.

I.

The claimants are citizens of the United States and of the State of Ohio.

II.

On or about the 25th day of May, 1892, the United States, through W. L. Marshall, a captain in its corps of engineers, published the following advertisement inviting proposals for constructing a canal to be known as the Illinois and Mississippi canal:

"UNITED STATES ENGINEER OFFICE,
"ROOM 90, 134 VAN BUREN ST.,
"CHICAGO, ILL., *May 25th*, 1892.

"Sealed proposals in triplicate for constructing three miles or less of the trunk of the Illinois and Mississippi canal near the mouth of Rock river; for screening, sorting, and delivering sand and pebbles, and for excavating the lock pits, and constructing the foundations for three locks, will be received at this office until 12 noon, central time, Saturday, June 25th, 1892, and then opened. Bidders are invited to be present. Blank forms of proposals and specifications will be furnished on application. General plans of the works can be seen and other information can be had at the office of Assistant Engineer L. L. Wheeler, at Milan, Illinois.

"The attention of bidders is invited to acts of Congress approved February 26, 1885, and February 23, 1887, vol. 23, page 332, and vol. 24, page 414, Statutes at Large. Preference will be given to materials of domestic production, conditions of quality and price (including duties) being equal. The United States reserves the right to reject any or all bids.

"W. L. MARSHALL,
"*Captain, Corps of Engineers, U. S. A.*"

15 III.

In response to said advertisement claimants submitted a bid or proposal to do certain parts of said work, which was accepted by Captain Marshall, acting under the following authority from the Chief of Engineers United States Army.

"UNITED STATES ENGINEER OFFICE,
"1637 INDIANA AVE., P. O. DRAWER 132,
"CHICAGO, ILL., *June* 29, 1892.

"Brig. Gen. Thos. L. Casey, Chief of Engineers, U. S. A., Washington, D. C.

"GENERAL: I have the honor to forward herewith abstract of proposals, together with one copy of each proposal received, for constructing three miles or less of canal trunk, Illinois and Mississippi canal, with the following recommendations, viz:

"That bid of Messrs. Monroe & Richardson, of Portsmouth, Ohio, be accepted for the following works:

"Earthwork for 3 miles canal trunk.

"Sand and pebbles at lock 36.

"Sand and pebbles at guard-lock.

"Lock pit and foundation at lock 36.

"That the bid of Michael H. King, of Des Moines, Iowa, be accepted for—

"Lock pit and foundation at guard-lock.

"That bid of Andrew J. Whitney, of Rock Island, Ill., be accepted for—

"Lock pit and foundation of lock 37.

"Sand and pebbles at lock 37.

"The above recommendations are made provided none of the bidders named above appear at engineer department on list of failing contractors.

"Very respectfully, your obedient servant,

"W. L. MARSHALL,
"*Captain, Corps of Engineers.*"

(1st indorsement.)

"ENG'R DEPARTMENT, *July* 2, 1892.
"OFFICE CHIEF ENGINEERS, *July* 6, 1892.

"Respectfully returned to Captain Marshall, corps of engineers, who is authorized to accept the bid of Monroe & Richardson for the earthwork for the three miles canal trunk, for sand and pebble at guard-lock, and for lock-pit foundation at lock 36.

"The bid of Michael H. King, of Des Moines, Iowa, for lock pit and foundation at guard-lock, and the bid of Andrew J. Whitney, of Rock Island, Ill., for lock pit and foundation of lock 37 and for sand and pebble at lock 37, these bidders being the lowest for the several items.

"The Chief of Engineers desires to know what objection exists to awarding the contract for sand and pebbles at lock 36 to
16 Wilcoxon, Quigley & Moore, of St. Louis, Mo., they being apparently the lowest bidders for that item.

"By command of Brig. Gen. Casey:

"THOS. TURTLE,
"*Capt., Corps of Engineers.*"

(2d indorsement.)

"Rec'd Chicago, July 8, 1892.

"U. S. ENGINEER OFFICE,
"CHICAGO, ILL., *July* 8, 1892.

"Respectfully returned to the Chief of Engineers U. S. A.

"Under the terms of the specifications (par. 45) the awards for sand and pebble were to be made, if at all, to the contractors for that part of the canal trunk containing the deposits, delivery of sand and pebble to be considered with the earthwork, and under these terms, Monroe & Richardson, being the lowest bidders, for that part of trunk containing deposits, as well as for the lock-pit and foundation at lock 36, it was recommended that their bid for sand and pebble be accepted for lock 36 and guard-lock.

"W. L. MARSHALL,
"*Captain, Corps of Engineers.*"

(3d indorsement.)

"Rec'd eng'r department, July 11, 1892.

"OFFICE OF CHIEF OF ENGINEERS,
"U. S. ARMY, *July* 12, 1892.

"Respectfully returned to Captain Marshall, corps of engineers, who is authorized to accept Monroe & Richardson's bid for sand and

pebbles at lock No. 36. When such record as may be necessary has been made this paper will be returned to this office.

"By command of Brig. Gen. Casey:

"THOS. TURTLE,
"*Captain, Corps of Eng'rs.*"

IV.

On the 20th day of July, 1892, Captain Marshall forwarded to claimants the formal contract, annexed to and forming part of the petition, and bonds to be executed within ten days thereafter, all which claimants fully executed and returned to the said engineer on the 28th day of July, 1892, which formal contract was duly signed by Captain Marshall. The form of the contract had been prepared by the Chief of Engineers and forwarded to Captain Marshall for use in such cases.

V.

Immediately upon receiving notice of the acceptance of their said bid claimants began preparation for the commencement of said work. They shipped their plant from Portsmouth, Ohio, to Rock Island, Ill.; rented and furnished a boat and had the same
17 taken to Rock river, in the vicinity of the work, to be used as a boarding-house for men employed on the work; built stables for their teams; hired men and teams; purchased a large amount of plant, consisting of shovels, plows, scrapers, and the like, and generally equipped themselves in a proper manner to expeditiously perform the work, and commenced the work with men and teams about the 1st day of August, 1892.

VI.

On the 6th day of August, 1892, without fault on their part and while the work was progressing, claimants were stopped by the United States and their contract abrogated against their consent, and the work that they had contracted to do readvertised, for the alleged reason that by the act of August 1, 1892, no work could be prosecuted by the United States without a stipulation in the contract binding the contractor not to permit his workmen to labor more than eight hours per day, and the United States refused to permit claimants to continue the work either under the terms of the contract or under the terms of the law of August 1, 1892, but immediately, and against the protest of claimants, readvertised and let the said work to other parties.

VII.

In the prosecution of said work under said contract, prior to the abrogation thereof on August 6, 1892, claimants expended the sum of $678.21, which has not been paid to them.

VIII.

By reason of the abrogation of said contract claimants lost the

following sums expended and were deprived of the following profits which they would have made in the execution of said work:

Expenses incurred	$678.21
Profits if they had been permitted to perform	7,150.00

Conclusion of Law.

Upon the foregoing findings of fact the court decide, as a conclusion of law, that the petition be dismissed.

Opinion of the Court.

NOTT, Ch. J., delivered the opinion of the court:

On the 1st of August, 1892, the contracting officer of the United States mailed the contract in suit at Chicago, duly executed by both parties, to the Chief of Engineers in Washington for his approval. It was immediately disapproved and returned to the officer with instructions to readvertise the work. This was done and the work was subsequently let to other parties. The contractors bring their suit accordingly for their losses sustained and gains prevented.

Whether the reason for which the Chief of Engineers disapproved the contract was a good and valid one the court has not been called upon to determine. The question involved in the case is, whether the approval of the formal contract by the Chief of Engineers
18 was essential to its validity, or, stated differently, whether in the circumstances of the case he could annul an otherwise valid contract by the mere act of his disapproval.

In Speed's case (8 Wall., 77) the Supreme Court held, concerning a contract which in terms provided that it should be subject to the approval of the commissary general, that his approval need not be in writing. This court had found from circumstantial evidence that the contract and the performance of the contractors under it were known to the commissary general and that he had indicated his approval by letter to the contracting officer, and the court had held that the contract had been approved. The decision was affirmed by the Supreme Court for the reason that neither the instrument itself nor any rule of law prescribed the mode in which the approval should be evidenced, and that a jury would have been justified in finding as this court had done. In this case the contract likewise contained a provision that "this contract shall be subject to approval of the Chief of Engineers." But there the resemblance between the two cases ends. In the former case the superior officer impliedly, though indirectly, and informally, approved; in this case, without laches or delay, he unequivocally disapproved.

In the somewhat similar case of Darragh (33 C. Cls. R., 377) it was held "that where a contract is in terms subject to the approval of the quartermaster general, approval is a condition precedent to the legal effect of the agreement." The counsel for the claimant seeks to take this case out of the rule of that decision by reason of certain peculiar facts and circumstances.

These facts and circumstances show that the printed form of the agreement was prepared by and furnished to the contracting officer by the Chief of Engineers, and therefore was within his knowledge and to that extent had his approval; that the contracting officer submitted the contractor's bids to the Chief of Engineers before entering into the contract and was duly authorized and empowered by the Chief of Engineers to accept the bids and enter into the agreement; that the objection of the Chief of Engineers did not relate to any provision of the contract, but was based simply upon the fact that he himself had not approved it before the 1st of August, 1892, when the act was passed making it penal for a contractor to permit or allow more than eight hours' work in any calendar day. (Act of August 1, 1892, 27 Stat. L., 340.)

As before said, it is not the duty of this court to pass upon the question whether the reason for which the Chief of Engineers disapproved the contract was valid and sufficient. Neither is the court required by the circumstances of the case to find whether there was an implied or circumstantial approval of the contract. The action of the Chief of Engineers was certainly prompt and unequivocal. If he had done nothing and had allowed the contractors to proceed with the work, and had approved vouchers for payment as the work progressed, it is probable that the case would be considered as coming within the rule sanctioned by the Supreme Court in Speed's case; but here the written formal contract, the final act of the parties, expressly provided in so many words "that this contract shall be subject to approval of the Chief of Engineers," and it is impossible for the court to hold that those words meant nothing, or that they meant that a prior contract had been approved by
19 the Chief of Engineers. On the contrary the court must reiterate the decision in Darragh's case and say that where a contract entered into by a subordinate is in terms subject to approval of his superior, approval is a condition precedent to the validity of the agreement.

In addition to gains prevented, the claimants seek to recover for certain expenses to which they were put by the action of the defendants' officers. The contract bears date the 19th July, 1892. It provides in terms that the contractors "shall commence work on or before the 1st day of August, 1892," but it appears by evidence *aliunde* that the instrument was not mailed to the contractors for signature until the 20th July, 1892; that it was returned for corrections; that it was not finally mailed for signature until the 27th of July, 1892, and that it was not signed by the contractors until some day between the 27th of July and the 1st of August, 1892. On the faith of the agreement executed by the contracting officer, but without his knowledge or direction, the contractors proceeded to make ready for their work and, indeed, performed to some extent, incurring thereby a loss of $678.21. This makes what is commonly called "a hard case." Nevertheless, if the approval of the Chief of Engineers was a condition precedent to the validity of the contract and the work was done without the knowledge or direction of the officer in charge and no benefit resulted thereby to the defendants it must be

held that the service was voluntary. The contractors acted in good faith, but at their own risk. No man can thrust a contract upon another. There must be agreement or something from which agreement can be inferred—request, acquiescence, knowledge or the retention of a consideration which can be returned. A contract cannot be implied from the voluntary acts of only one party.

The case has come before the court upon a motion of the defendants which their counsel has likened to a demurrer to the evidence. If it were being tried in any other court at *nisi prius*, the defendants might move, in like circumstances, that the claimants be nonsuited, or might demur to the evidence, or request the court to direct a verdict for the defendants. Here the claimants have closed their evidence and rested their case. In modern practice the defendants would be entitled in another court to test the sufficiency of the claimants' case in some way without being put to the trouble and expense of refuting it by evidence. If their motion, or demurrer, or whatever it might be, should be sustained, that would be the end of the case; if overruled, they would proceed with their defense. There is no objection to a like practice in this court. It may necessitate two arguments, but that is an objection which would also exist in any other court. Certainly the Government ought not to be put to the expense and trouble of taking evidence where a case can be disposed of on a question of law.

But inasmuch as the claimants may wish to appeal and the evidence cannot go up, this court will now find the facts and assess the damages which the claimants have suffered. The findings will then be, to all intents and purposes, a verdict taken subject to the opinion of the court. The claimants, as has been said, have exhausted their testimony, and the counsel for the defendants, in view of this motion, is content therewith. The case is simple for the reason that there has been no partial performance of the work. If the work had proceeded, as in the ordinary case of contract, to partial completion, the claimants would be entitled to the two elements of damage which the law recognizes, "losses sustained" and "gains prevented." (Bulkley's case, 7 C. Cls. R., 543; affirmed, 19 Wall. R., 37.) But in this case substantially nothing has been done, and it is simply their profits which must be a matter of computation. In the contemplation of all parties who enter into express agreements it is supposed and understood that a reasonable profit shall be made by him who performs. (Bulkley's case, *supra*.) It is a matter of judgment what a reasonable profit is, and there have been numerous cases before the court showing that from 10 to 25 per cent. is regarded, prospectively, as the range of profits which contractors hope or expect to make. Taking this in connection with the evidence in the case, the court finds the amount which the claimants would have made if they had been permitted to perform and the amount of the expenses which they have incurred upon the faith of the contract which they signed; but upon the law the court holds that judgment must be for the defendants.

The judgment of the court is that the petition be dismissed.

20 *Judgment of the Court.*

MONROE AND RICHARDSON
v.
UNITED STATES. } No. 20003.

At a Court of Claims held in the city of Washington on the 26th day of February, A. D. 1900, judgment was ordered to be entered as follows:

The court on due consideration of the promises find for the defendants and do order, adjudge and decree that the petition of the said claimants be dismissed.

BY THE COURT.

21 *Application for and Allowance of Appeal.*

SAMUEL MONROE and DAVID M. RICHARDSON, Late Copartners Trading as Monroe and Richardson,
v.
UNITED STATES. } No. 20003.

From the judgment rendered in the above-entitled cause on 26th day of February, 1900, in favor of the defendants, the claimants, by their attorney of record, John C. Fay, on this 7th day of April, 1900, make application for and give notice of an appeal to the Supreme Court of the United States.

JOHN C. FAY,
Attorney for Claimants.

SAMUEL A. PUTMAN.

Filed April 7, 1900.

Ordered, that the foregoing application for appeal be allowed as prayed for.

April 7, 1900.

BY THE COURT.

22 Court of Claims.

SAMUEL MONROE and DAVID M. RICHARDSON
vs.
UNITED STATES. } No. 20003.

I John Randolph assistant clerk of the Court of Claims certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law filed by the court, of the opinion of the court, of the judgment of the court dismissing the petition, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set m
the seal of said Court of Claims this 14th day of

[Seal Court of Claims.]

JOHN RANI
Ass't Cler

Endorsed on cover: File No. 17,819. Court
No. 98. Samuel Monroe and David M. Richards
trading as Monroe and Richardson, appellan
States. Filed June 29th, 1900.

NITED STATES.

t my hand and affixed
of April A. D. 1900.

ANDOLPH,
Clerk Court of Claims.

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llants, *vs.* The United